NO. 80-495

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD E. LESTER, JR. AND SUE FURGER LESTER,
Petitioners

VERSUS

LAURA ANDERSON, EXECUTRIX OF THE ESTATE OF R. C. ANDERSON,
Respondent

ON WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is a creditor who illegally refuses to perform the acts required by 15 U.S.C. 1635(b) to effect rescission of a consumer loan under the Truth in Lending Act required to return to the consumer all money received from the consumer and to forfeit to the consumer the balance of the loan proceeds?

II. Is a creditor who illegally refuses to perform the acts required by 15 U.S.C. 1635(b) to effect rescission of a consumer loan under the Truth in Lending Act required to pay civil penalties and attorney's fees to a consumer who sues for this violation of the Act?

LIST OF PARTIES

Petitioners: Donald E. Lester, Jr. and Sue Furger Lester, husband and wife.

Respondent: Laura Anderson, Testamentary Executrix of the Estate of R. C. Anderson.

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REFERENCE TO THE OPINIONS BELOW

Anderson v. Lester, 382 So. 2d 1019 (La. App. 3rd Cir. 1980), cert denied 385 So. 2d 790 (La. 1980).

JURISDICTION OF THE COURT

Opinion and decree of the Louisiana Court of Appeal, Third Circuit, were entered in this cause on March 5, 1980. On April 4, 1980, petitioners timely applied to the Court of Appeal for rehearing. On May 5, 1980, the application of petitioners for rehearing to the Court of Appeal was denied.

On June 4, 1980, petitioners timely filed with the Supreme Court of Louisiana, an application for writs of certiorari or review to review the judgment of the Court of Appeal. The Supreme Court of Louisiana denied petitioners' application for writs of certiorari or review on June 23, 1980.

This petition for writ of certiorari is filed within ninety days of the finality of the judgment of the Louisiana Court of Appeal, Third Circuit. Jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. Section 2101 (c). *Department of Banking, State of Nebraska, v. Pink*, 317 U.S. 264, 63 S. Ct. 233, 87 L. Ed. 254, Rehearing denied 318 U.S. 802, 63 S. Ct. 850, 87 L. Ed. 1166 (1943); *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977).

Respondent filed no motion for rehearing before the Court of Appeal, nor any application for writs of certiorari or review to the Supreme Court of Louisiana. Accordingly, the judgment entered by the Court of Appeal in favor of petitioners on their reconventional demand against respondent is final *Banks v. California*, 395 U.S. 708, 89 S. Ct. 1901, 23 L. Ed. 2d 653 (1969).

APPLICABLE STATUTES AND REGULATIONS

I. Statutes:

15 U.S.C. 1635(a), (b), (f)

15 U.S.C. 1640(a), (e)

28 U.S.C. 2101(c)

LSA - - C.C.P. art. 2166

II. Regulations:

12 C.F.R. 226.9(a), (b), (c), (d),

Federal Reserve Board staff Public Information Letter, May 29, 1975. CCH, *Cons. Cred. Guide*, Para. 31,230 (1974-1977 Trans-Bind.)

STATEMENT OF THE CASE

On January 27, 1975, petitioners entered into a consumer credit transaction with R. C. Anderson, issuing their promissory note of that date payable to the order of Anderson for $77,000, with 10% per annum interest from date. Although the face amount of the note was for $77,000, in fact, the courts below found that petitioners received only $70,000 at the closing, although respondent contended that they they recieved $77,000. This usury aspect of the case under state law is not before the Court on this petition for certiorari.

Petitioners made payments on the note to Anderson of $8,983.28, but were in default on the note when Anderson filed suit on November 18, 1976. By answer and reconventional demand petitioners admitted execution of the note and mortgage, denied any indebtedness to respondent, and averred that Title I of the Federal Consumer Credit Cost Disclosure Act (Truth in Lending Act) and Regulation Z thereunder, applied to the transaction. Petitioners further alleged that Anderson violated the Act and Regulations by failing to make the required credit disclosures, and by failing to inform petitioners of their right of rescission under the Act. By that reconventional demand, petitioners notified their creditor of their exercise of their right of rescission, and made demand against respondent for civil damages, statutory penalties and attorney's fees. An additional defense of usury was asserted under state law.

Anderson answered the reconventional demand of petitioners, denying that the provisions of the Truth in Lending Act and Regulations thereunder applied to the transaction, and asserting that the right of rescission did not apply on the ground that the loan was made for the purpose of financing construction of the Lesters' new dwelling.

On May 5, 1977, Petitioners' attorney mailed to Anderson

a letter stating

> "Pursuant to the provisions of the Truth in Lending Act and Regulation Z thereunder, Donald E. Lester, Jr. and Susan Furger Lester hereby elect to rescind the captioned credit transaction entered into with you on January 27, 1975."

The quoted notice of rescission was furnished to Anderson subsequent to his receipt of judicial notice of rescission in petitioners' original answer and reconventional demand. As noted by the Louisiana Court of Appeal, Third Circuit, following receipt of the notice of rescission of the transaction "[p]laintiff's response was to continue prosecution of his suit for payment." (Appendix "A" p. 4a).

By first amended answer and reconventional demand, petitioners clarified the causes of action asserted under the Truth in Lending Act in the trial court. Anderson, by exception of prescription of one year, sought dismissal in the trial court of petitioners' reconventional demand on the contention that the claims asserted were barred by the statute of limitation of one year in 15 USC 1640(e).

The trial court in an opinion dated June 8, 1979, ruled in pertinent part

> "Plaintiff is indeed in the lending business; he is subject to the Truth and (sic) Lending Act; . . . that the plaintiff is a creditor and defendants are consumers within the Truth and (sic) Lending Act; that the money was used by the defendants for personal, family, household and agricultural purposes; that plaintiff failed to provide defendants with duplicates of the instruments, as required.
>
> It is the reasoning of the Court that defendants are

entitled to rescission under the provisions of 15 U.S.C., et seq., and that the defendants are not liable for that finance or any other charges in connection with this obligation, and the Court finds the note and mortgage void by operation of law.

The federal law also specifies that the plaintiff must forfeit the entire amount of the funds advanced to the defendants in connection with the loan.

Plaintiff's failure to provide defendants with notice of the right of rescission entitles each of the defendants to recover $1,000.00 statutory penalty for plaintiff's failure to make the required disclosures.

Defendants are entitled to return of all interest paid, being the sum of $8,983.28 under the Truth and (sic) Lending Law." (Appendix "C" pp. A-30, A-31).

The Court further awarded attorneys's fees in favor of the Lesters in the sum of $10,000.

Anderson appealed the judgment of the District Court to the Louisiana Court of Appeal, Third Circuit. Petitioners answered the appeal, requesting an increase in attorney's fees and damages.

On March 5, 1980, the Louisiana Court of Appeal, Third Circuit, issued its opinion and decree affirming in part, reversing in part, and recasting the judgment of the trial court (Appendix "A"). The appellate court agreed that the Truth in Lending Act applied to the transaction, that Anderson violated that Act by failing to furnish to petitioners the disclosures and notice of right of rescission required by the Act, and that petitioners were entitled to rescission of the credit transaction and refund of the monies paid to Anderson. But the Court of Appeal reversed that portion of the judgment of the court below, ordering forfeiture by the creditor of the balance of the

loan owed to him by petitioners. The Court of Appeal also reversed the award of civil penalties and attorney's fees in favor of petitioners, finding that the demand for rescission was timely under the Act, but that the demand for attorney's fees and civil penalties was not. Under state law, the Court awarded petitioners $4,000 damages and attorney's fees for Anderson's wrongful sequestration of their property.

On April 4, 1980, petitioners applied to the Court of Appeal, Third Circuit, for rehearing. While that application was under consideration by the Court, respondent, Laura Anderson, executrix of the estate of R. C. Anderson, was substituted as party plaintiff in these proceedings. On May 5, 1980, the application for rehearing was denied. On June 23, 1980, the timely application by petitioners to the Supreme Court of Louisiana for writs of certiorari or review was denied.

ARGUMENT

The questions presented for review by this petition pose significant issues for resolution by the Court under the Truth in Lending Act. Answers to these questions will establish both the correct procedure to be followed by parties to covered credit transactions, and will establish their respective rights and obligations when the consumer elects to exercise his right of rescission granted under 15 USC 1635(b). Substantive conflicts in interpretation of the procedures to be followed, and of the rights and obligations of the parties have developed in the decisions of the Fourth, Fifth and Ninth Circuit Courts of Appeal. And the decisions of all of the Courts of Appeal conflict materially with the interpretation placed on Section 1635(b) of the Act by the Federal Reserve Board Staff. The issues presented are of national importance, and therefore should be resolved by this Court.

I. *A CREDITOR WHO ILLEGALLY REFUSES TO PERFORM THE ACTS REQUIRED BY SECTION 1635(b) TO EFFECT RESCISSION OF A CONSUMER LOAN TRANSACTION COVERED BY SECTION 1635(a) OF THE TRUTH IN LENDING ACT MUST RETURN ALL MONEY RECEIVED FROM THE CONSUMER AND MUST FORFEIT TO THE CONSUMER THE BALANCE OWED ON THE LOAN.*

No issue is presented by this petition of whether the January 27, 1975, credit transaction is covered by the Truth in Lending Act, and subject to exercise of the right of rescission by petitioners. The Courts below determined that R. C. Anderson was a wealthy individual engaged in the business of making private loans at usurious rates of interest under state law. Those Courts found that the loan from Anderson to petitioners was an extension of consumer credit subject to the right of rescission established in Section 1635(a) of the Act:

> "(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor, *in accordance with regulations of the Board*, of his intention to do so. The creditor shall clearly and conspicuously disclose, *in accordance with regulations of the Board*, to any obligor in a transaction subject to this

section, the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Borad, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section." 15 U. S. C. 1635(a) (Emphasis supplied)

The Courts below has no difficulty concluding that petitioners were entitled to receipt of notice of their right of rescission of the credit transaction with Anderson, and that since they were never furnished notice of this right of rescission, their exercise of that right less than three years from the date of the loan was timely. 15 USC 1635(f).

Pursuant to Section 1635(a) the Federal Reserve Board by regulation specified the manner in which a debtor may exercise this right of rescission. 12 CFR. 226.9(b). That regulation allows the consumer to exercise his right of rescission by mail or telegram or any other form of written notice identifying the transaction being rescinded, delivered to the creditor at his place of business, dated and signed by the debtor. If the debtor utilizes the notice of rescission form suggested by 12 CFR. 226.9(b), he merely states, "I hereby cancel this transaction."

Section 1635(b) of the Act establishes the sequence to be followed when an obligor exercises the right of rescission, and imposes a creditor forfeiture penalty to encourage self-compliance. That Section states:

> "(b) When an obligor exercises his right to rescind under subsection (a) of this Section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or

otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it." 15 USC 1635(b).

Petitioners timely and properly exercised the right of rescission. Their creditor failed to take any action whatsoever to cancel his mortgage on petitioners' property, or to return to petitioners the monies they paid to Anderson on the loan. This question presents for review the correctness of the decision of the Court of Appeal eliminating the creditor-forfeiture penalty imposed upon Anderson by the trial court.

The Federal Reserve Board staff released a Public Information Letter dated May 29, 1975, explaining its interpretation of the effect of rescission by a debtor under Section 1635(b). CCH, *Cons. Cred. Guide*, Par. 31,230 (1974-1977 Trans. Bind) (Appendix "G"). That Public Information Letter provides. in part:

"In your second question you ask whether the failure of the creditor to return the payments to the customer within ten days entitles the customer to retain the proceeds of the loan without further obligation to the creditor. Where the creditor has delivered property to

the customer, Sec. 226.9(d) provides that he may retain possession of it; only upon the creditor fulfilling his obligations under the subsection is the customer required to make tender of the property to the creditor. *If the creditor fails within ten days to terminate any security interest and return the payments which he has received from the customer, he has by definition not fulfilled the requirements of the subsection, and Staff is of the opinion that the customer need make no tender of the proceeds to the creditor, retaining them without further obligation.*" (Emphasis Supplied).

In *Ford Motor Credit Company v. Milhollin*, _____ U.S. _____, 100 S. Ct. 790, _____ L. Ed. 2d _____, (1980), the Court held that Federal Reserve Board staff opinions are dispositive on questions of interpretation of the Act and Regulation Z. The Court sided with a Federal Reserve Board staff construction of the Act and Regulation Z as imposing no requirement upon creditors to disclose the existence of an acceleration clause. By the role afforded the Federal Reserve Board, this Court found that Congress signalled "an unmistakable congressional decision to treat administrative rule making and interpretation under TILA as authoritative." 100 S. Ct. at p. 798. The Court stated:

> "Courts should honor that congressional choice. Thus, while not abdicating their ultimate judicial responsibility to the determine the law (citations omitted) judges ought to refrain from substituting their own interstitial law making for that of the Federal Reserve so long as the latter's law making is not irrational. *Id.*"

The Court further noted:

> "Because creditors need sure guidance through the 'highly technical' Truth in Lending Act (citations

> omitted), legislators have twice acted to promote reliance upon Federal Reserve pronouncements. . . . . The explicit purpose of the amendment was to relieve the creditor of the burden of choosing 'between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act.' " 100 S. Ct. at p. 797.

This Court concluded that deference to the Federal Reserve Board is compelled by necessity, stating that

> ". . .[A] court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views. . . ." 100 S. Ct. at p. 798."

The decision of the Louisiana Court of Appeal in reversing the trial court imposition of the creditor-forfeiture penalty upon respondent in this cause, adopted an interpretation of Section 1635(b) in direct conflict with the interpretation of the Federal Reserve Board staff in the quoted Public Information Letter. The agency's view is clear

> "If the creditor fails within ten days to terminate any security interest and return the payments which he has received from the customer, he has by definition not fulfilled the requirements of the subsection, and the Staff is of the opinion ***that the customer need make no tender of the proceeds to the creditor, retaining them without further obligation.***" (Emphasis supplied).

The Louisiana Court of Appeal has rejected the agency view and determined that the creditor in this cause shall have the benefit of a debtor tender of the loan proceeds at such time as the creditor hereafter complies with its judicial mandate to

effect rescission. That decision will afford this creditor nearly four years within which to complete the acts evidencing rescission, without penalty of forfeiture for his violations of the Act. This result does not encourage creditor self enforcement.

In *Sosa v. Fite*, 498 F. 2d 114 (5th Cir. 1974), the plaintiff contracted with "a home improvement contractor of dubious repute. . .to provide and install aluminum siding on her house." 498 F. 2d at p. 116. The contractor arranged for financing, including the creation of a security interest in the plaintiff's home. Neither the contractor nor the lender provided the plaintiff with the required Truth in Lending Act disclosures, including the notice of right of rescission. Disenchantment with the contractor's work culminated in plaintiff's termination of the payments to the lender, who foreclosed on its security interest in the realty and sold plaintiff's property to a third party. Plaintiff rescinded the transaction by notice to the contractor and lender, who took no responsive steps to undo the transaction. Sosa sued and was awarded rescission in the trial court, but that court entered judgment in favor of the creditors against the plaintiff for the balance of the contract price, less interest, after credit for plaintiff's payments, and impressed her property with a judgment lien to secure that balance. This same order was entered in the instant case. Plaintiff in *Sosa* appealed, contending that the failure of the defendant to rescind the transaction within ten days of receipt of notice relieved her of the obligation to pay the balance of the indebtedness.

The Court stated at 498 F. 2d 118:

> "Under the provisions of Section 1635(b), when the debtor exercises the rescission right, he is no longer liable for any finance or other charge, and any security interest acquired by the creditor in the debtor's residential realty becomes void. At this juncture, the creditor incurs several responsibilities. Within ten days after

receipt of a rescission notice, the creditor is obligated, first, to return any downpayment or earnest money, and second, to take any appropriate steps to reflect the termination of the security interest. According to the statute, '[u]pon the performance of the creditor's obligations' in this regard, the debtor shall tender to the obligee either the property or the reasonable value thereof if return of the property would be inequitable or impracticable."

The Court noted that "included in Sosa's notice of rescission was an express offer to return the aluminum siding, an overture which elicited no response whatsoever from the creditors," and that neither of the creditors "ever performed their statutory obligations imposed by Section 1635(b) since, for one, they utterly failed to take any steps to reflect termination of the security interest in Sosa's property." 498 F. 2d at p. 118.

The creditors resisted plaintiff's demand for forfeiture of the balance of the loan contending that the plaintiff was obligated to return the creditors to the status quo ante by tender of return of the loan proceeds. The Court's analysis of this creditor defense is incisive:

> "It is true that the statute contemplates an orderly progression of specific events, culminating in the debtor's tender and the creditor's recoupment, which never came to pass in this case. Specifically, Section 1635(b) envisions responsive action on the creditor's part to a rescission notice, after which the debtor then becomes obligated to tender either the property or a sum reflecting its reasonable value. This precise statutory scheme was aborted in this case due to the creditors' failure to comply with statutory requirements, ***hence Sosa's responsibility to make the specific statutory tender was excused by the creditors' omissions.***

To hold otherwise would create a gross anomaly, for no tender in the exact scheme envisioned by the statute could ever be effected by a debtor in the most egregious of circumstances, namely when a creditor steadfastly refuses to perform his express obligations upon receiving the notice of rescission. Congress scarcely could have contemplated such a disruptive commercial stand-off. We therefore conclude that under the circumstances of this case, the debtor's obligation to restore the creditor to the status quo ante was discharged by an offer accompanying notice of rescission, since the creditor within ten days of notification failed to return all monies previously paid by the debtor, or to reflect dissolution of the security interest.

. . .

Congress' intended operation of the statute, as evidenced by the 1635(b) creditor-forfeiture provisions, therefore clearly calls for a debtor windfall if the creditor does not set about to rectify his earlier nondisclosures in the manner envisioned by the statute. In fact, the Act flatly provides that if his creditor continues in his untoward ways, the debtor incurs no obligation to pay for property which he is at the same time entitled to keep. That this result was intended is clear beyond peradventure, for one of the measure's principal sponsors in the House stated: '[I]f the seller does not come back to pick up [his property] after a 10-day period [following the notice of rescission], the buyer can keep this item and he does not even have to pay for it. . . .' 114 Cong. Rec. 14398 (1968) (remarks of Congresswoman Sullivan)." 498 F. 2d at pp. 119, 120. (Emphasis supplied.)

Thus, in *Sosa*, the Court held that where a debtor accompanies his notice of rescission with an expression of willingness to return the property acquired in the credit transaction, or "tenders" such return, and the creditor fails to take the steps required by the Act to reflect the rescission, the debtor is thereafter relieved of any obligation to return the property, or to pay the balance of the loan. The Court noted, however, that "under a literal reading of the statute the creditors were unentitled to any tender at all by virtue of their failure to perform their express obligation. . . ." 498 F. 2d at p. 118. It is also important to note that Sosa did not make an actual "tender" at the time of notice of rescission, for all she offered to return was the aluminum siding on her house, with no mention of tender of the balance due on the loan transaction, or the reasonable value of the work performed in putting the siding on her house. Thus she did not, in fact, make a tender:

> ". . .the word 'tender' is defined as an unconditional offer of payment consisting in the actual production, in current coin of the realm, of a sum not less than the amount due on a specific debt or obligation. This is the common-law definition of tender, and except as modified or qualified by statute, the definition is generally applicable." 74 Am Jur. 2d Tender, Sec. 1.

From the decision in *Sosa*, it is apparent that the Court's characterization of the plaintiff's willingness to return the siding to the creditors as a "tender" was dicta, since the Court expressly held that "Sosa's responsibility to make the specific statutory tender was excused by the creditors' omissions." Nevertheless, in later deicsions of the Fifth Circuit, that Court has now imposed a requirement that the consumer tender return of all property received from the creditor, including any balance due on the credit transaction, at the time the creditor is notified of the exercise by the consumer of his right of rescission, as a condition precedent to imposition of creditor forfeiture. *Gerasta v. Hibernia National Bank*, 575 F. 2d 580 (5th Cir. 1978); *Harris v. Tower Loan of Mississippi, Inc.*, 609 F. 2d

120 (5th Cir. 1980); ***Bustamante v. First Federal Savings & Loan Association***, 619 F. 2d 360 (5th Cir. 1980).

In ***Gerasta***, plaintiffs received a home improvement loan from the defendant, secured by a second mortgage on their home. Discovering that the bank had not made all the material disclosures required by the Act, plaintiffs exercised their statutory right of rescission. The bank failed within ten days of receipt of notice of rescission to return to plaintiffs all money received from them, and to take the necessary actions to reflect termination of the bank's security interest created by the second mortgage on the plaintiffs' property. The District Court rescinded the transaction and held that the creditor forfeited its right to recover the property delivered to the obligors because of its failure to perform those duties. The Court of Appeal reversed on the issue of creditor forfeiture. The Court agreed that the plaintiffs had properly rescinded the transaction, but held that since they had failed to tender the loan proceeds to the bank, the creditor forfeiture provisions of Section 1635(b) did not apply. The Court stated:

> "Section 1635 does not expressly provide a remedy for the situation in which the creditor fails to take any action upon receipt of a rescission notice, and the consumer does not tender the creditor's property." 575 F. 2d at p. 583.

Although the court in ***Sosa*** held that the consumer's responsibility to make a specific statutory tender was excused by the creditors' omissions, because "Congress could scarcely have contemplated such a disruptive commercial stand-off," in ***Gerasta*** the Court concluded that Congress did intend such a stand-off.

In ***Harris v. Tower Loan of Mississippi, Inc., supra***, the creditor failed to perform its obligations after receipt of notice

of rescission. The trial court cancelled the transaction, ordered forfeiture on the part of the creditor, and awarded statutory penalties and attorney's fees. The Court of Appeal again revversed that portion of the judgment of the court below that ordered creditor forfeiture of the balance of the loan indebtedness to plaintiff, apparently on the basis that plaintiff had not tendered a teturn of those loan proceeds to the creditor. The Court allowed the rescission to stand, and rejected the creditor's contention that rescission also should be conditioned upon tender of return of the loan proceeds by the obligor. To the same effect is the Court's decision in ***Bustamante v. First Federal Savings & Loan Association, supra.***

The Fifth Circuit's rule in the decisions since *Sosa* requiring consumer tender as a precondition to creditor forfeiture for noncompliance with the requirements of Section 1635(b) is in violation of the literal language of Section 1635(b), and the Congressional mandate that rescission be effected "in accordance with regulations of the Board." Section 1635(a). As quoted above, 12 CFR 226.9(b) allows rescission by the consumer statement, "I hereby cancel this transaction," without mention of tender.

At least two courts which have adopted the rule of law enunciated in *Sosa* with respect to creditor forfeiture have applied that rule in the absence of a prior consumer tender. The Supreme Court of Colorado, in ***Strader v. Beneficial Finance Company of Aurora,*** 551 Pac. 2d 720 (1976), construes Section 5-5-204(2) of the Uniform Consumer Credit Code, which is identical to Section 1635(b) of the truth in Lending Act, in the same manner Section 1635(b) is interpreted by the Federal Reserve Board Public Opinion Letter of May 29, 1975 quoted above. In *Strader*, the creditor failed to make a material disclosure to the plaintiffs in connection with a credit transaction secured by a second deed of trust on the Strader's residence.

Following notice of rescission, the creditor took no steps to rescind the transaction. The Court discussed the reasons for the creditor forfeiture provision:

> "The creditor is required to remove the cloud on the title of the debtor's residence within ten days. Then and only then is the debtor obligated to tender. After tender by the debtor, if the creditor fails to take possession of the property tendered, 'ownership of the property vests in the debtor without obligation to pay. . . .' ***We hold that this statutory provision is intended as an impetus for the creditor to take immediate action to clear title and to fulfill its obligations. If not interpreted in this way, there is no stimulus for the creditor to comply with the statutory provisions requiring him to release the security interests within the ten day period.***
>
> ***Sosa v. Fite***, 498 F. 2d 114 (5th Cir. 1974), supports our holding. . . .
>
> We hold, as did the Court in ***Sosa***, supra, that the requirement of tender arises only after the security interest is released. If it is not released within the ten days following notice of rescission, the debtor is relieved of the obligation to tender and the property vests in the debtor." (Emphasis supplied.)

In ***French v. Wilson***, 446 F. Supp. 216 (U.S.D.C. R. I. 1978), that Court adopted the rule of creditor forfeiture in the event the creditor fails to rescind the transaction within the ten days required by the Act, rejecting the rule of ***Palmer v. Wilson***, 502 F. 2d 860 (9th Cir. 1974), discussed below, which imposes consumer tender as a precondition to the right of rescission itself.

The decision of the Fifth Circuit in ***Sosa*** is in accord with the Federal Reserve Board interpretation of the rescission process,

and with the literal language of Section 1635(b). Perhaps that Court's retreat from its holding in ***Sosa*** was prompted by later decisions of the Ninth and Fourth Circuits.

In ***Palmer v. Wilson***, 502 F. 2d 860 (9th Cir. 1974), decided two weeks after ***Sosa v. Fite, supra***, the Ninth Circuit first considered the rescission and forfeiture provisions of Section 1635(b). Plaintiffs borrowed $9,300 from defendants secured by a deed of trust on their home. The proceeds of the loan were disbursed to the benefit of plaintiffs by defendant. Five and one-half months later, plaintiffs notified defendants of the exercise of their right of rescission. See, 359 F. Supp. 1099. The creditors did not comply with their obligation to rescind the transaction, and plaintiffs sued. The trial court declared the deed of trust on plaintiffs' property void, enjoined sale of their property, and awarded plaintiffs $1,000 in civil penalties and $4,400 attorney's fees under Section 1640(a) of the Act.

The Court of Appeal vacated the judgment of the trial court and remanded the cause for further proceedings. The Court, although recognizing that a consumer is entitled to pursue both rescission of a credit transaction under Section 1635(b), and civil penalties and attorney's fees under Section 1640(a), found, on the basis of equitable considerations, that it had the power to ***condition rescission*** of the credit transaction on the debtors' prior tender of the loan proceeds to the creditor:

> ". . .the court may condition the granting of rescission on the debtor's compliance with the court's order to tender to the creditor the principal of the loan that the debtor has received." 502 F. 2d at p. 862.

The dissenting opinion correctly observed:

> "Section 1635(b) provides that upon the debtor's election to rescind, the creditor's security interest in the debtor's home becomes ***void***. There is no requirement that the debtor tender payment before rescission.

> Nor is there a provision that the security interest is merely voidable by petitioning the district court. Thus, when the plaintiffs exercised their right to rescind by notifying the defendants, the security interest automatically became void and unenforceable.
>
> The majority opinion would permit the district court effectively to reinstate the security interest that Section 1635(d) (sic) declares void, at least as it affects the rights of the debtor and creditor *inter se*. If rescission is conditioned on repayment and if the plaintiffs do not repay, the security interest would presumably still be in force. This is in direct conflict with Section 1635(b). Indeed, conditioning the voiding of a security interest on repayment is effectively no remedy at all because, after repayment, the security interest has fulfilled its purpose and has lost its vitality.
>
> Although the majority speaks of conditioning rescission on payment, the remedy might be interpreted to mean merely that plaintiffs' obligation to repay the principal can be incorporated into the judgment of the district court and enforced by a court imposed lien. This would rescind the security interest, but the defendant would become a judgment creditor with a court imposed lien on plaintiff's home. It would alter the creditor's rights vis-a-vis third-party creditors, but it would permit the defendants to foreclose in the event of nonpayment." 502 F. 2d at p. 863 (Emphasis in original).

The rule announced in *Palmer v. Wilson* that a "court may condition the granting of rescission on the debtor's compliance with the court's order to tender to the creditor the principal of the loan that the debtor has received," has been applied on numerous occasions by district courts within the Ninth Circuit, and has been reiterated by that Court in its later decisions in *Ljepava v. M. L. S. C. Properties, Inc.*, 511 F. 2d 935 (1975),

and *LaGrone v. Johnson*, 534 F. 2d 1360 (1976).

The violence this rule inflicts on the letter and spirit of Section 1635(b) is demonstrated in *Ljepava*. There the plaintiffs, two brothers with eighth grade educations, lived in a 5-room house on a 15-acre prune farm inherited from their parents. Their property was located in an area of new residential development, and had a market value of approximately $225, ooo. In order to refinance a second deed of trust on their property, which was in default, plaintiffs borrowed $36,000 from defendants, secured by a deed of trust on the property. Of the $36,000, $24,480 was paid on behalf of the Ljepavas, and $11,520 was paid in commissions to loan brokers for "finding" the loan. The loan was for one year at 10% interest, or $3,600, plus other charges. When the Ljepavas defaulted in payment, defendant recorded a notice of default and proposed to sell their property at foreclosure sale. Plaintiffs sued for injunction to restrain the sale, for rescission of the transaction, and for civil penalties and attorney's fees under the Truth in Lending Act. A preliminary injunction issued prohibiting the sale. At trial, the Court found that the Act had been violated and awarded plaintiffs civil penalties and attorney's fees.

> "In addition, the district judge held that plaintiffs could rescind the loan contract if plaintiffs tendered to defendants, within ten days, an amount equal to the proceeds of the loan disbursed to them or for their account ($24,480) plus the amounts subsequently advanced by defendants to the holders of the first deed of trust ($8,681.49).
>
> At the expiration of the ten-day period provided in the court's order, the defendants moved to dissolve the preliminary injunction against holding a foreclosure sale on the ground that the plaintiffs had failed to avail themselves of the court's rescission order . . .

While there is no evidence in the record concerning events subsequent to the trial, it appears that within the ten-day period in question, the Ljepavas had finalized arrangements to sell their property to Anthony Cansano for $180,000 and that an escrow account had been set up to facilitate the sale. It appears that defendants refused to agree to release their mortgage subject to the subsequent payment to them of $33,161.49 from the escrow account. Instead they apparently maintained that the rescission order permitted them to insist upon payment prior to their release of the mortgage. The trial judge, concluding that plaintiffs had failed to tender in accordance with his rescission order, dissolved the injunction and cancelled the award of the attorney's fees. . . .

Within three weeks after the post-trial hearing, it appears that the Ljepavas successfully completed the sale of their property for $180,000, and paid the defendants $67,356.62 so that they would release their deed of trust. Of the amount paid defendants, $33,161.49 represented the amount which would have been payable under the court's order; the remainder covered, inter alia, the commissions to HLC Financial and Paulson Mortgage of $11,520.00, a prepayment penalty of one year's interest ($3,600), and attorney's fees of $10,000." 511 F. 2d at pp. 939, 940.

The Court of Appeal held that tender by the debtors of the full amount of the loan proceeds within the ten-day period set by the Court below was not a mandatory requirement for rescission, and in view of the egregious violations of the Act by the defendants,

". . .the district court should have provided a more liberal remedy for the Ljepavas. . . . ***The least the court should have done when it appeared that there was a factual dispute over whether tender had been made***

[by the Ljepavas] ***within the ten-day limit it had imposed was to hold a hearing to determine what actually had happened.***" 511 F. 2d at p. 944. (Emphasis supplied)

The refusal by the Ninth Circuit to apply the literal language of Section 1635(b) has repeatedly frustrated the purposes of the Act, and has created debtor hardship, as in *Ljepava*. As explained in the lengthy quote from that case, the debtors were required to sell their home in order to meet the Court's requirement of tender as a condition precedent to rescission of the transaction. Had the Act been followed, and the security interest in their home removed from the public records by the creditor within the ten-day period provided by the Act, the Ljepavas would have been able to refinance the indebtedness in view of the substantial equity in their property. Instead, they were required to sell their property within ten days at a $45,000 loss, trying to place themselves in a position to tender the balance of the loan proceeds to their creditor. The outrageous result in *Ljepava* follows from the rule of law extant in the Ninth Circuit that the debtor must tender all to the creditor as a condition of rescission. That Court never has had occasion to pass upon the issue of creditor forfeiture, apparently because debtors in the Ninth Circuit cannot clear the initial hurdle of tender of all loan proceeds and property received from the creditor as a condition precedent to rescission of a credit transaction. Unless rescission is effected, there can be no creditor forfeiture. 15 USC 1635(b).

The Fourth Circuit has also adopted a rule requiring consumer tender as a condition to exercise of the right of rescission. *Powers v. Sims and Levin*, 542 F. 2d 1216 (4th Cir. 1976). There the Court stated;

> "The district court, and we, exercising traditional equity powers, ***may condition the borrower's continuing right of rescission upon their tender to the lender of***

> ***all of the funds spent by the lender in discharging the earlier indebtedness of the borrowers as well as the value of the home improvements.***

Concerning creditor forfeiture of the value of the funds advanced on behalf of the debtors the dissent asserted:

> ". . .in my view, the application of general contract law principles leads to the conclusion that the performance of the condition of tender [by the debtor] has been wxcused, because the defendant prevented its performance by failing to carry out its antecedent duties under the statutory scheme (return of payments and release of security interest within ten days of rescission)."

The dissent in ***Powers v. Sims and Levin*** expounded upon the basis for the holding of the Court in ***Sosa v. Fite***, supra, that actual tender to the creditor of return of money or property received by the debtor is excused by creditor default in effecting rescission. It is interesting to note that the results in ***Sosa*** and ***Powers*** are diametrically opposite, although the facts surrounding the debtors' executions of their respective notices of rescission are not distinguishable. In ***Sosa***, the plaintiff's offer to return a part of the consideration for the loan transaction was considered a full tender of performance, and in ***Powers***, similar language was interpreted as an "anticipatory breach" of an obligation to tender.

The Courts of Appeal are in error in relying upon their equitable powers to require debtor tender prior to rescission and/or creditor forfeiture. This Court has previously determined that the remedies provided by the Act are quasi-penal in nature. ***Mourning v. Family Publication Service, Inc.***, 411 U.S. 356, 376; 93 S. Ct. 1652, 1664, 36 L. Ed. 2d 318 (1973). The Court stated at 93 S. Ct. 1665:

> "That the approach taken may reflect what respondent views as an undue paternalistic concern for the consumer is beside the point. The statutory scheme is within the power granted to Congress under the Commerce clause. It is not a function of the courts to speculate as to whether the statute is unwise or whether the evil sought to be remedied should better have been regulated in some other manner."

The requirement of debtor tender engrafted by the Fourth and Ninth Circuits on the Section 1635(b) right of rescission has effectively eliminated that right as a means of debtor relief and incentive for creditor self-enforcement of the disclosure provisions of the Act. A creditor in receipt of notice of rescission from a debtor not accompanied by a debtor tender of all proceeds from the credit transaction would be foolish indeed to take the steps required by Section 1635(b). As pointed out by the dissent in ***Palmer v. Wilson***, supra, by refusing to rescind and litigating all issues, a creditor can, at worst, convert his conventional security interest in the debtor's property to a judicially imposed lien without fear of loss of the loan proceeds or other property advanced to the obligor. Possibly the only creditor in jeopardy of forfeiture is one who attempts unsuccessfully to complete rescission within ten days.

The Federal Reserve Board interprets Section 1635(b) literally, and requires no debtor tender as a condition to rescission or creditor forfeiture. This interpretation of Section 1635(b) by the Board is not "demonstrably irrational." ***Ford Motor Credit Company v. Milhollin, supra***, at p. 797. Accordingly, the "unmistakable congressional decision to treat administrative rule making and interpretation under TILA as authoratative," 100 S. Ct. at p. 798, should be honored and that agency's interpretation adopted by this Court as controlling.

II. *A CREDITOR WHO ILLEGALLY REFUSES TO PERFORM THE ACTS REQUIRED BY SECTION 1635(b)*

TO EFFECT RESCISSION OF A CONSUMER LOAN IS LIABLE FOR CIVIL PENALTIES AND ATTORNEY'S FEES TO A CONSUMER WHO FILES SUIT WITHIN ONE YEAR FROM THE DATE OF THE OCCURRENCE OF THE VIOLATION

The Louisiana Court of Appeal, Third Circuit, ruled that petitioners' right to statutory penalties and attorney's fees prescribed under the time limitation imposed by 15 USC 1640(e), and therefore reversed the judgment of the trial court awarding petitioners $1,000 each in civil penalties, and attorney's fees of $10,000.

The credit transaction occurred on January 27, 1975. None of the disclosures required by the Act were ever made by Anderson. In February, 1977, petitioners notified Anderson by reconventional demand of their exercise of the right of rescission, and additionally asserted their claims for civil penalties and attorney's fees. This judicial notice of rescission was followed by a letter of notification on May 5, 1977, two years and four months after the date of the loan.

Section 1635(f) of the Act establishes a three year statute of limitations on the action for recission: Section 1640(e) establishes a one year statute of limitations on the action for civil penalties and attorney's fees, "from the date of the occurrence of the violation."

As originally enacted, Section 1640 provided for civil penalties and attorney's fees only for violations of disclosure requirements. Congress amended Section 1640(a) in 1974 to make the current provisions for damages, civil penalties and attorney's fees applicable to any creditor who violates *"any requirement"* of Sections 1631 to 1645 of the Act. ***Gerasta v. Hibernia National Bank, supra,***

Anderson's failure to cancel his mortgage and return the

monies paid by petitioners within ten days of receipt of petitioners' notice of exercise of their right of rescission was a violation of the Act giving rise to a right in petitioners to civil penalties and attorney's fees, which was asserted timely.

CONCLUSION

At least three conflicting interpretations of the requirements for rescission and creditor forfeiture under Section 1635(b) have evolved in the jurisprudence of the federal Courts of Appeal and one state court of last resort. Confusion engendered by the conflicting interpretations of this Section by the Courts of Appeal has afflicted many of the decisions under that Section. These conflicting results harm significant state and federal interests in creating certainty and uniformity of expectations under the Truth in Lending Act.

Petitioners respectfully suggest to this Honorable Court that the interpretation of Section 1635(b) adopted by the Federal Reserve Board most nearly reflects Congressional intent in adopting that Section, and should be approved by the Court in this case. The Board's interpretation fosters the Act's purpose of safeguarding the consumer in connection with the utilization of credit by encouraging creditor self enforcement. The decisions of the Courts of Appeal have effectively eliminated creditor forfeiture as a self enforcement mechanism under the Act.

In choosing to reverse the trial court, the Louisiana Court of Appeal, Third Circuit, disregarded the Federal Reserve Board's interpretation of Section 1635(b) in favor of the more restrictive interpretation of the Fifth Circuit Court of Appeal in *Gerasta v. Hibernia National Bank, supra.* In so doing, that Court also disregarded this Court's instructions to courts in *Ford Motor Credit Company v. Milhollin, supra,* to follow Federal Reserve Board interpretations of the Act. The rule of law in Louisiana is now contrary to the Board's interpretation

of Section 1635(b).

The appropriate time and vehicle for review by the Court of the mechanics of rescission and of the respective rights and obligations of the parties to rescinded credit transactions are presented by this petition for writ of certiorari on behalf of Donald E. Lester, Jr. and Sue Furger Lester. We respectfully request that the writ issue.

BY ATTORNEYS:

GOLD, LITTLE, SIMON, WEEMS & BRUSER

By_____

Henry B. Bruser III
2001 MacArthur Drive
P. O. Box 6118
Alexandria, Louisiana 71301
(318) 445 - 6471

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I certify that three copies of this petition for writ of certiorari have been served upon respondent, Laura Anderson, Executrix of the Estate of R. C. Anderson, by depositing same in the United States Mail with first-class postage prepaid and properly addressed to her attorney of record, Russell E. Gahagan, Gahagan and Gahagan, Attorneys at Law, Post Office Box 70, Natchitoches, Louisiana 71457.

Alexandria, Louisiana, this _____ day of September, 1980.

Henry B. Bruser III

APPENDIX A

NUMBER 7463

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

R.C. ANDERSON

Plaintiff & Appellant

VERSUS

DON LESTER, ET UX

Defendant & Appellee

Appeal from the Tenth Judicial District Court for the Parish of Natchitoches, Judge Peyton Cunningham, Jr. Presiding

Before Culpepper, Guidry and Doucet, Judges
Culpepper, Judge

This is a suit for payment of a promissory note and for recognition of a mortgage on immovable property. Plaintiff, R. C. Anderson, holds the promissory note, dated January 27, 1975, in the principal amount of $77,000. Defendants, Donald E. Lester and Suzanne F. Lester, are makers of the promissory note secured by the pledge of a collateral mortgage note, which in turn is secured by the mortgage on their home and two non-contiguous lots. The defense is violation by plaintiff of the provisions of 15 USC 1601, et seq., The Truth in Lending Act, (the Act), and certain Federal regulations issued pursuant thereto. In the alternative, defendants urge usury. Defendants also filed a reconventional demand for damages and attorney's fees under the Act.

Trial of the matter was initiated on June 2, 1977, at which

time an exception of prescription of one year under Section 1640(3) of the Act was filed by plaintiff. After one day of trial, the case was continued. During the continuance, plaintiff caused a writ of sequestration to issue, seizing the mortgaged property. Plaintiff then filed a second suit against defendants and the sheriff to take physical possession of the property. Trial of the case continued on April 10-11, 1978, the parties stipulating that both pending suits, plaintiff's re-urged exception of prescription and defendants' subsequent motion to dissolve the writ of sequestration would be heard together. Trial was again continued to May 27, 1979, at which time it was completed.

With written reasons, the trial judge dismissed plaintiff's demands. He granted defendants' reconventional demand for rescission of the transaction, cancellation of the mortgage, damages and attorney's fees under the Act. The trial judge also ordered a forfeiture of the money loaned. The trial court opinion makes no reference to plaintiff's exception of prescription, or to plaintiff's second suit or to defendants' motion to dissolve the writ of sequestration.

The issues on appeal are whether the trial court erred: (1) in applying the Act; (2) in ordering the forfeiture of the loan proceeds; (3) in awarding damages and attorney's fees under the Act, despite the one-year prescriptive period; and (4) in failing to award damages and attorney's fees for wrongful issuance of the writ of sequestration.

FACTS

In late 1974, defendant Lester was experiencing financial difficulties. His business operations, a trucking firm known as Delta Express, Inc., and a feed mill, were heavily indebted. Lester was personally obligated on many of the business debts, as well as three Federal tax liens, the largest of which arose out

of an assessment of estate taxes on Lester's father's estate. Defendant feared the immediate loss of his one unencumbered asset, his home. To pay off the most pressing creditors, defendant sought to obtain another loan.

Plaintiff is a wealthy individual who makes private loans. On January 27, 1975, plaintiff and defendant, accompanied by defendant's attorney, met at the office of plaintiff's attorney to complete a loan transaction. Mr. Lester also came to the office for a brief moment to sign the appropriate documents. Both attorneys left the room while plaintiff and Donald Lester reached a final agreement. There is no contention that any notices or disclosures required under 15 USC 1601, et seq, were made by plaintiff.

The plaintiff testified that he gave defendant $7,000 in cash and $70,000 by check or money order, making a total of $77,000 loaned, represented by a demand note bearing interest at the rate of 10% per annum from date, secured by a collateral mortgage note payable in monthly installments. Defendants admit signing the note for $77,000 but deny that they actually received more than the $70,000 money order. According to defendants, the $7,000 was additional interest on the loan. Defendants' attorney deposited $70,000 in a trust account. Records of the disbursement show that part of the funds were used to pay personal debts and part were used for business debts.

Defendant paid a total of $8,983.28 on the loan and then ceased payment. Plaintiff filed this suit on November 18, 1976 and obtained a default judgment, which was later set aside. On May 5, 1977, defendants' attorney mailed to plaintiff a letter stating:

> "Pursuant to the provisions of the Truth in Lending Act and Regulation Z thereunder, Donald E. Lester, Jr. and Suzanne Furger Lester hereby elect to rescind

the captioned credit transaction entered into with you on January 27, 1975."

Plaintiff's response was to continue prosecution of his suit for payment.

APPLICATION OF 15 USC 1601, ET SEQ.

The following definitions provided in 15 USC 1602 are applicable:

> "(e) The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.
>
> "(f) The term 'creditor' refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise.
>
> * * *
>
> "(h) The adjective 'consumer', used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes."

15 UCS 1603 sets forth the following pertinent exemptions from the Act:

> "This subchapter does not apply to the following:
> "(1) Credit transactions involving extensions of credit

for business or commercial purposes,

* * *

"(3) Credit transactions, other than real property transactions, in which the total amount to be financed exceeds $25,000."

Section 1631 of the Act provides in part:

"Disclosure requirements - Clear and conspicuous disclosure to person extended consumer credit

"(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended, the information required under this part or part D of this subchapter.

" Statement of information where more than one obligor

"(b) If there is more than one obligor, a creditor need not furnish a statement of information required under this part or part D of this subchapter to more than one of them."

Plaintiff's response was to continue prosecution of his suit for payment.

APPLICATION OF 15 USC 1601, ET SEQ.

The following definitions provided in 15 USC 1602 are applicable:

"(e) The term 'creditor' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

"(f) The term 'creditor' refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise.

* * *

"(h) The adjective 'consumer' used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property,, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes."

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" Statement of information where more than one obligor

"(b) If there is more than one obligor, a creditor need not furnish a statment of information required under this part or part D of this subchapter to more than one of them."

The plaintiff argues that the Act does not apply in this case for two reasons: First, because the transaction is exempt under Section 1603(1) and, second, because plaintiff is not a "creditor" as defined in Section 1602(f).

EXEMPTIONS UNDER THE ACT

In determining whether a particular transaction falls within the Act, the court in Sapenter v. Dreyco, Incorporated, 326 F. Supp. 871 (E. D. La. 1971), affirmed 450 F. 2d 941 (5th Cir. 19) gave the following analysis of the issue:

"Not all credit transactions are covered by the Truth In Lending Act, however, and the Act expressly provides that it does not apply to [c]redit transactions involving extensions of credit for business or commercial purposes * * *.' 15 U.S.C. Sec. 1603(1).

* * *

"Furthermore, the Truth In Lending Act was enacted as part of the Consumer Credit Protection Act of 1968, and specifically deals only with consumer credit trans-

> actions, characterized as 'one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for ***personal, family, household, or agricultural purposes***.' 15 U.S.C. Sec. 1602(h). (Emphasis added)
>
> * * *
>
> "In determining whether a particular transaction is exempt, therefore, the purpose of the transaction or extension of credit is controlling, not the property on which the security interest is retained. . . ."

Accordingly, the first issue here is to determine whether the loan transaction is to be characterized as having a business or commercial purpose, or whether the loan is to be deemed a transaction within the comprehension of the Truth In Lending Act. Plaintiff contends that the use of part of the funds for business debts rendered the business exemption applicable. Defendant contends that the laon should be characterized according to the purpose for which the money was borrowed or most funds actually used, which, under defendants' calculations, went toward personal and agricultural debts. Defendant is supported by Smith v. Chapman, 436 F. Supp. 58 (W. D. Tx. 1977), where the federal court applied the Act to a transaction in which the plaintiff purchased an automobile primarily for her personal use, even though the vehicle was also used incidental to plaintiff's business. In doing so, the court stated:

> "[1, 2) The Act is aimed at providing consumers with information in order to be able to intelligently shop for credit. 15 U.S.C. Sec. 1601, Mourning v. Family Publications Service, Inc. 411 U.S. 356, 93 S. Ct. 1652 36 L. Ed. 2d 318 L9730). A 'consumer credit' transaction is one in which the credit is given 'primarily for personal, family or household purposes.' (emphasis

added) 15 U.S.C. Sec. 1602(h); 12 C.F.R. Sec. 226.2 (p). The term 'business credit' is not defined but since the purpose of the Act is to provide information in 'consumer credit' transactions, then it must be clear that business credit is something other than credit given primarily for personal, family or household purposes.

"It stands to reason that the business credit exemption arises whenever the credit is given primarily for a business purpose and not just when the credit is given entirely for a business purpose. On the other hand the Act applies when the credit is given primarily for a personal, fanily or househouse use and not just when it is given entirely for a personal, family or household use."

We find even more persuasive support for defendants' position in the case of Gerasta v. Hibernia National Bank, 411 F. Supp. 176 (E. D. La. 1976), affirmed in part, reversed in part 575 F. 2d 570 (5th Cir. 1978). In that case, the court applied the Act to a transaction in which the debtor had used the acquired funds for the purpose of repairing and/or improving property which initially was rented but "ultimately" was intended to be the debtor's home. This attention to the debtor's ultimate purpose is consistent with the usual liberal construction of the Act in favor of the debtor. Sellers v. Wollman, 510 F. 2d 119 (5th Cir. 1975).

In the present case, the evidence clearly shows that the defendants' purpose in entering into this transaction was to prevent a seizure on their home. The defendants testified that they were motivated to seek a loan after being examined by the attorney for a judgment creditor, Natchitoches Collections, Inc., who informed defendants that their home would be seized. The funds were applied to selected debts which represented the most immediate threats to the security of

their home. Furthermore, both plaintiff's testimony, and correspondence from defendants' attorney show that plaintiff was made aware of defendants' concern for their home and the purpose of the loan.

We conclude the transaction was not one for business or commercial purposes and is not exempt under Section 1603(1).

"CREDITOR" UNDER THE ACT

The plaintiff next contends that the Act does not apply because he is not a 'creditor' as defined in Section 1602(f). The court in Gerasta, supra, at the trial level, interpreted this section as follows:

> "In enacting truth-in-lending legislation, it was Congress' intention to 'assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.' 15 U.S.C. Sec. 1601. The disclosure requirements, however, are imposed only on 'creditors,' or those who 'regularly extend, or arrange for the extension of credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise.' 15 U.S.C. Sec. 1602(f) (emphasis added).
>
> "[5) The Board has further defined the term 'creditor' to mean one 'who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers " 'to extend or arrange for the extension of such credit.' 12 F. R. Sec. 226.2 (m) (emphasis added). The exemption is limited, therefore, to those whose ' extensions [or arrangement] of credit are an occasional, isolated, and incidental portion of their business.' "

The question here, then is whether plaintiff was in the business of regularly extending credit. At trial, plaintiff denies that he made more than an "occasional" loan. He stated that he had no more than six to eight loans outstanding at any one time, including January, 1975.

Plaintiff's position at trial is contrary to all other evidence and to plaintiff's own admissions at the time of his deposition, when he responded as follows:

"Q. What is your occupation?

"A. Well, I used to be a farmer, I have a few cattle now, and I have a little lending business, just mostly coasting right now.

"Q. What is the nature of this lending business?

"A. What do you mean by the nature of it?

"Q. Well, what type of loans do you make?

"Q. Most any kind of loans, I don't loan on automobiles, no school teachers or cars, or nothing like that. Mostly real estate.

"Q. Primarily real estate and would these loans be secured by mortgages?

"A. Right.

"Q. How long have you been doing this?

"A. Since 1945.

"Q. Say, at any particular point in time, can you tell me approximately how many loans you might have outstanding?

"A. That I have out now? I would have to go through the book and add them up . . . fifteen or twenty, I imagine, something similar to that.

"Q. Is this number fairly constant ?

"A. Yes.

"Q. Moneywise, I suppose the total of the outstanding amount of the loans would vary, depending upon the size of the loan?

"A. Right, the size of the loan.

"Q. Would this also be true for the situation that existed in January of 1975?

"A. What do you mean, what would be true?

"Q. Well, the number of loans you had outstanding?

"A. Practically the same amount.

* * *

"Q. Just say, right now, outstanding, would you say that you had in excess of a half a million dollars in loans outstanding right now?

"A. I got more than that.

"Q. Would you think it would be a million?

"A. No, not that much.

"Q. Seven hundred fifty thousand?

"A. I'm not going to tell you how much I got out, to be frank with you. I don't believe that's quite any of your business. It's between a half million and a million.

"Q. Would it have been about this amount when you made the loan to Don Lester?

"A. Approximately."

Further evidence of the extent and regularity of plaintiff's lending activities is found in plaintiff's income tax returns for the years 1965-1976, which were introduced at trial. These returns include for each of those years, a form entitled "Schedule C-Profit (or Loss) from Business or Profession." Starting in 1968, plaintiff listed "Store and Loans" as his principal business activity. Entries show that plaintiff paid the following amounts of interest on business indebtedness:

"1969 - $96,000.00

1972 - 36,437.00

1973 - 63,575.00

1974 - 29,790.00

1975 - 34,158.46

1976 - 34,807.00"

At his deposition, plaintiff explained the 1976 entry as follows:

"Q. Other than that, the other large deduction item on this return is interest on business indebtedness. It says 34,809.85. Can you just briefly tell me the nature of

that business indebtedness, what the money was borrowed for?

"A. No, I can't. . . . that's money I borrowed?

"Q. Yes, sir, interest on money that you borrowed?

"A. Oh, well, that could have been several different places. I get by, and once in a while I get a chance to make a loan and I go and borrow the money . . . I used to know when I had some money coming in, but I don't know that no more. Since I have had them two years behind with their payments. I used to borrow a little money from banks, to make a loan. I'm not sure what that was for.

"Q. Would the loan be for the store?

"A. No, sir, the store has nothing to do with the loan business. The store stands out on its own, it operates on its own.

"Q. This interest that we are talking about . . .

"A. Interest is the interest that I make on my loaning business.

"Q. But this interest that you paid, this $34,809.00?

"A. That is some more of my loan business.

"Q. You borrowed money and turned around and loaned it to somebody else?

"A. That's right."

Based on the above and other evidence in the record, we have no difficulty in concluding that plaintiff is a "creditor" covered by the Act.

REMEDIES UNDER 15 U.S.C. 1601, ET SEQ.

Since we find the Act applies, the next issue is whether defendant is entitled to the remedies found in Sections 1635(a), (b) and (f), and 1640(a), which provide as follows:

> "Section 1635. Right of rescission as to certain transactions - Disclosure of obligor's right to rescind
>
> "(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section.

"Return of money or property following rescission

"(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. ***Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.*** If the creditor has delivered any property to the obligor, the obligor "may retain possession of it. ***Upon the performance of the creditor's obligations under this section,*** the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it.

"Time limit for exercise of right

"(f) An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs earlier, notwithstanding the fact that the disclosures required under this section or any other material disclosures required under this part have not been delivered to the obligor."

"Section 1640 Civil liability - Individual or class action

for damages; amount of award; factors determining amount of award

"(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of - -

"(1) any actual damage sustained by such person as a result of the failure;

"(2) (a) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000;

* * *

"(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

* * *

"Jurisdiction of courts

"(e) any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."

In discussing the issue of remedies, the court in Geresta, supra, on appeal stated:

> "[2] This court has recognized that the Truth in Lending Act provides 'detailed remedial machinery' to redress violations of the Act. Sosa v. Fite, 498 F. 2d 114, 117 (5th Cir. 1974). Therefore, courts should apply those remedies provided in the Act. Burgess v. Charlottesville Savings and Loan Association, 477 F. 2d 40, 45 (4th Cir. 1973); Jordan v. Montgomery Ward & Co., 442 F. 2d 78, 81-82 (8th Cir.), cert. cenied, 404 U. S. 870 (92 S. Ct. 78, 30 L. Ed. 2d 114 (1971).
>
> * * *
>
> "[3.4] Section 1635 and Section 1640 are not mutually exclusive remedies; a consumer may be entitled to both rescission pursuant to Section 1635 and damages pursuant to Section 1640. See Mourning v. Family Publications Service, Inc. 411 U.S. 356, 376, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973); Sellers v. Wollman, 510 F. 2d 119, 123 (5th Cir. 1975)."

SECTION 1635

This section becomes operative where, as here, the consumer credit transaction results in a security interest in a debtor's home. Section 1635(a). Since the Act applies, defendant here had a right to rescind the transaction for three days after the transaction or delivery of notices. Where, as here, no notices were ever delivered, the debtor's right to rescind continued until exercised or the three-year period expired. Within the three years, defendant notified plaintiff of his desire to rescind. Defendant testified that plaintiff did not respond to the notice.

Plaintiff, in his brief, concedes that under Section 1635(b),

defendant owes no interest and the mortgage is cancelled. Plaintiff raises a substantial question, however, as to the principal amount of the loan, i.e., $70,000. Does the debtor's right to rescind include the right to retain the loan proceeds.

In granting the rescission, the trial court ordered a forfeiture of the loan proceeds, stating that "The federal law also specifies that the plaintiff must forfeit the entire amount of the funds advanced to the defendants in connection with the loan." As we appreciate the federal jurisprudence, the trial judge erred in ordering an automatic forfeiture.

In Gerasta, supra, the court of appeal reversed the district court decision on the issue of the forfeit, only, and explained their position as follows:

> "The statement of law contained in this opinion may be usefully illustrated by its application to the facts involved in the case on appeal. The Gerastas determined that the defendant Bank had violated the disclosure provisions of the Act. Therefore, the Gerastas notified the Bank of their intention to rescind the loan transaction pursuant to Section 1635. The Bank did not perform its statutorily prescribed duties within ten days, allegedly because the Gerastas' rescission was equivocal and because the Bank was uncertain whether the transaction came within the ambit of the disclosure and rescission provisions of the Truth in Lending Act. The Bank's noncompliance exposed the Bank to the possibility of increased liability pursuant to Section 1640(a).
>
> "[6] It has now been judicially determined that the Gerastas were entitled to rescind their transaction with the Bank and that the Gerastas' notice of rescission was valid. Therefore, the Bank now must return to the Gerastas any money or property that it has received from them in connection with this transaction. The

> Bank also must take any action necessary to reflect the termination of any security interest created in the Gerastas' property by the transaction. ***Upon the Bank's performance of its duties, the Gerastas must tender the loan proceeds to the Bank. They should be given a reasonable time within which to do so. Unless the Bank fails to take possession within ten days of tender, its interest will not be forfeited.***
>
> "This court's decision in Sosa v. Fite, 498 F. 2d 114 (5th Cir. 1974), does not require a different result. In Sosa, as in the case on appeal, the creditors did not perform their statutorily prescribed duties after receiving the consumer's notice of rescission. In Sosa, however, the consumer's notice of rescission was accompanied by the consumer's express offer to return the creditor's property. The court in Sosa emphasized that the consumer's obligation to restore the creditor to the "status quo ante was discharged by the tender. In the case on appeal, on the other hand, the Gerastas stated in their rescission notice that they refused to tender the loan proceeds until the Bank performed its statutorily prescribed duties." (emphasis supplied)

There is no evidence nor contention in the present case that defendant ever tendered to plaintiff the loan proceeds. Therefore, the forfeiture provision in Section 1635(b) is not now applicable. Upon plaintiff's performance of his duties under the Act, the defendant must, within a reasonable time, tender to plaintiff the $70,000 loan.

SECTION 1640. PENALTIES AND ATTORNEY'S FEES

There is also a substantial question of law on the issue of damages and attorney's fees under Section 1640. At trial on June 2, 1977, plaintiff filed an exception of prescription based

on Section 1640(e), quoted above. The record does not contain a ruling on this exception, but there is reference to it having been overruled. Obviously, it was overruled because the trial court awarded the $1,000 maximum statutory damages under Section 1640(2) (2) (A) (1) and attorney's fees of $10.000 under Section 1604 (a) (3).

Defendant concedes in brief that the exception of prescription of one year should have been maintained as to Section 1640 damages. However, defendant argues that this prescription does not apply to the award of attorney's fees, citing Burley v. Bastrop Loan Company, Inc., 407 F. Supp. 773 (W. D. La. 1975). In that case, the district court held that a debtor who obtained rescission for a creditor's violation of the Act was entitled to an award of attorney's fees, even though his claim for damages had prescribed. This decision was reversed and remanded on the issue of liability, 590 F. 2d 160 (5th Cir. 1979) but continues to be cited by some Federal District Courts for its holding on the issue of attorney's fees. See Clemmer v. Liberty Financial Planning, Inc., 467 F. Supp. 272 (W. D. N.C. 1979).

Although decisions of Federal District Courts and Circuit Courts of Appeal construing federal statutes are persuasive. they are not binding on state courts. Only such decisions of the United States Supreme Court are binding on us. State v. Selman, 300 So. 2d 467 (La. 1974); Morris v. Transworld Drilling Company, 365 So. 2d 46 (3rd Cir. 1978); Bromley v. Crisp, 561 F. 2d 1351 (10th Cir. 1977).

We cannot agree with the decision in Burley v. Bastrop Loan Company, Inc., supra. In our view, Section 1640(e) is clear and free of ambiguity. It states that "any action under this section (i. e., Section 1640), may be brought . . . within one year from the date of the occurrence of the violation."

Section 1640 provides for damages, limited to $1,000, and a reasonable attorney's fee. Under 1640(e), any action for such relief must be brought within one year of the violation. We are supported in this view by Sosa v. Fite, 498 F. 2d 114 (5th Cir. 1974) and the cases cited there, which hold that penalty damages under Section 1640 are prescribed in one year. If penalties are prescribed in one year, it necessarily follows that attorney's fees are also, because both are provided by the same statute, Section 1640.

It is noteworthy that in at least two cases the Court of Appeal, Fourth Circuit, State of Louisiana, allowed a prescribed claim for damages under 15 U.S.C. 1640 to be used as a defense to a creditor's suit on the transaction. Termplan Mid-City, Inc. v. Laughlin, 333 So. 2d 738 (4th Cir. 1976) and Reliable Credit Service, Inc. v. Bernard, 339 So. 2d 952 (4th Cir. 1977). In these two cases the court applied LSA-C.C.P. Article 424, which permits a prescribed claim to be used as a defense to a suit on a related transaction. However, by Act No. 254 of 1977 our legislature amended Article 424 to expressly exclude prescribed claims under the Federal Consumer Credit Protection Act. Thus, Article 424 no longer has application in these suits.

WRONGFUL ISSUANCE OF SEQUESTRATION

The next issue is whether defendants are entitled to damages and attorney's fees for plaintiff's wrongful issuance of the writ of sequestration seizing their home.

The grounds for a writ of sequestration are provided in LSA-C.C. P. as follows:

> "Art. 3571. Grounds for sequestration
>
> "When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of

> sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action."

LSA-C.C.P. Article 3506 provides for dissolution of a wrongfully issued writ and for damages and attorney's fees.

Defendant complains here that the trial court erred in its omission of any reference to the issue of the wrongful sequestration. We agree. In light of the judgment canceling the mortgage, there was no real need to make a separate rule on the dissolution of the writ, but we find that a separate damage award is warranted because plaintiff had no grounds for the writ.

In a case dealing with a wrongful attachment, this court in American Steel Building Company v. Brezner, 159 So. 2d 623 (3rd Cir. 1963) stated:

> "As stated by our Supreme Court in General Motors Acceptance Corp. v. Sneed, 167 La. 432, 119 s. 417, 421 (1929): ' "Where a plaintiff sues out a writ of attachment in the honest belief that it is necessary for the protection of its rights, it seems rather unfortunate that it must be held liable for the payment of damages. But the writ of attachment is an extremely harsh remedy, and, when a party makes use of this powerful legal weapon he must be ready to respond in damages if it be found that the writ was wrongfully used." '

The issuance of the writ of sequestration in this case, coupled with the posting of the bond to attempt to obtain release of physical possession of the premises to the plaintiff, and the companion suit by plaintiff against the sheriff seeking to compel actual physical delivery of the defendants' home to the plaintiff during the pendency of this litigation, appears to have been a willful and deliberate attempt to cause harm,

damage, harassment, inconvenience, and mental anguish to the defendants. This action by the plaintiff was totally unwarranted for the reason that the property was subject to his mortgage of record, a suit for foreclosure was pending, and even had been tried one day at the time the writ of sequestration issued.

Mrs. Lester suffered emotional strain as a result of the issuance of the writ of sequestration and service upon her of the pleadings in the suit to compel the sheriff to deliver to R.C. Anderson actual physical possession of her home during the pendency of this drawn-out litigation. Mr. Lester also suffered.

Awards for inconvenience, anxiety and embarrassment caused as a result of the wrongful issuance of a writ are compensable damages. Homemakers Loan & Consumer Discount Company v. Arthur , 333 So. 2d 686 (La. App. 4th Cir. 1976); American Steel Building Company v. Brezner, 158 So. 2d 623 (La. App. 3rd Cir. 1964).

Defendants have prayed for $2,500 as damages and $1,500 as attorney's fees for the wrongful issuance of the writ of sequestration. They are entitled to these amounts.

USURY

Having granted defendants' demand for rescission of the transaction under the Act, we do not reach defendant's alternative demands based on usury.

DECREE

For the reasons assigned, the judgment appealed is affirmed in part and reversed in part and is recast to read as follows:

It is ordered, adjudged and decreed that, under the provisions of 15 U.S.C. Section 1635, that certain credit transaction

entered into between plaintiff and defendants on January 27, 1975 is rescinded. Plaintiff is ordered to return to defendants the sum of $8,983.28 in interest previously paid on the loan. Plaintiff is ordered to cancel and return to defendants the promissory note herein sued on. Plaintiff is ordered to cancel the collateral mortgage note in the sum of $77,000 of date January 27, 1975, made by defendants payable to themselves, and by them endorsed in blank, and plaintiff is ordered to take such steps as necessary to cancel and erase from the public records that certain collateral mortgage executed by defendants of date January 27, 1975, for the principal sum of $77,000, recorded in Mortgage Book 339, page 747 of the records of Natchitoches Parish, Louisiana, with which mortgage the note is paraphed for identification. Within a reasonable time, not to exceed thirty days, after plaintiff has performed the above obligations under this judgment, defendants are ordered to tender to plaintiff the sum of $70,000, representing the principal amount loaned in the credit transaction, without legal or conventional interest or any other charge. If defendants fail to tender to plaintiff the $70,000 within said thirty days, this judgment shall have the effect of a judicial mortgage under the provisions of LSA-C.C. Articles 3321, et seq. If defendants tender the $70,000 within said thrity days and plaintiff does not accept the $70,000 within ten days after tender, ownership of the money loaned vests in defendants without any obligation on their part to repay it.

It is further ordered, adjudged and decreed that the exception of prescription of one year filed by plaintiff as to defendants' reconventional demand for damages and attorney's fees under 15 U.S.C. Section 1640 be sustained, and defendants' demand for said damages and attorney's fees is dismissed.

It is further ordered, adjudged and decreed that there be judgment herein favor of Donald E. Lester, Jr. and Suzanne Surger Lester and against R. C. Anderson for the sum of $2,500 as damages, plus the sum of $1,500 as attorney's fees for the wrongful issuance of the writ of sequestration.

All costs in the trial court, as well as the costs of this appeal, are assessed against R. C. Anderson.

AFFIRMED IN PART, REVERSED IN PART, AND RECAST.

APPENDIX "B"

R. C. ANDERSON
VERSUS
DONALD E. LESTER, JR., ET AL

TENTH JUDICIAL DISTRICT COURT
PARISH OF NATCHITOCHES
STATE OF LOUISIANA

Filed Jun 19, 79

JUDGMENT

This matter came on for trial when there were present in Court: Russell E. Gahagan, attorney for plaintiff; and Henry B. Bruser III, attorney for defendants and plaintiffs in reconvention. The Court, considering the law and evidence and arguments of counsel, and considering the law and evidence to be in favor of defendants and plaintiffs in reconvention, Donald E. Lester, Jr. and Suzanne Furger Lester, declared:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, Donald E. Lester, Jr. and Suzanne Furger Lester, and against the plaintiff, R. C. Anderson, dismissing plaintiff's demands against defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Donald E. Lester, Jr. and Suzanne Furger Lester and against R. C. Anderson: rescinding and voiding the January 27, 1975 credit transaction between Donald E. Lester, Jr. and Suzanne Furger Lester and R. C. Anderson; cancelling the promissory note of Donald E. Lester, Jr. and Suzanne Furger Lester dated January 27, 1975, payable to the order of R. C. Anderson and sued upon by R. C. Anderson herein; ordering R. C. Anderson to return the above described promissory note to Donald E. Lester, Jr. and Suzanne Furger Lester and to further return the collateral

future holder motgage note pledged by them to secure payment of the hand note described above; and rescinding, voiding and ordering cancelled the act of collateral mortgage of Donald E. Lester, Jr. and Suzanne Furger Lester dated January 27, 1975, recorded in the mortgage records of Natchitoches Parish, Louisiana, at Mortgage Book 339, Page 747, paraphed for identification with the above described cancelled hand note.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Donald E. Lester, Jr. and Suzanne Furger Lester and against R. C. Anderson in the sum of EIGHTEEN THOUSAND NINE HUNDRED EIGHTY-THREE AND 28/100 ($18,983.28) DOLLARS for return of interest and attorney's fees with legal interest from judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Donald E. Lester, Jr. and against R. C. Anderson in the sum of ONE THOUSAND AND NO/100 ($1,000.00) DOLLARS for civil penalties with legal interest from judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Suzanne Furger Lester and against R. C. Anderson in the sum of ONE THOUSAND AND NO/100 ($1,000.00) DOLLARS for civil penalties with legal interest from judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Donald E. Lester, Jr. and Suzanne Furger Lester and against R. C. Anderson casting R. C. Anderson for all costs of court.

JUDGMENT RENDERED at Natchitoches, Louisiana, on the 8th day of June, 1979, for written reasons assigned.

JUDGMENT SIGNED at Natchitoches, Louisiana. on this the 18 day of June. 1979.

/s/ W. Peyton Cunningham, Jr.,
W. PEYTON CUNNINGHAM, JR., JUDGE
TENTH JUDICIAL DISTRICT COURT

Attest A True Copy This 19 Day June 1979
IRBY L. KNOTTS. JR.
CLERK TENTH DIST. Ct. LA.
By /s/ Jacque Collinsworth Dpty. Clk.

APPENDIX "C"

R. C. ANDERSON
VERSUS
DONALD E. LESTER, JR., ET AL

NUMBER illegible
TENTH JUDICIAL DISTRICT COURT
NATCHITOCHES PARISH, LOUISIANA

OPINION

Plaintiff filed suit on a promissory note dated January 27, 1975 in the amount of $77,000.00. Defendants admitted execution of the note and a collateral mortgage note and a act of mortgage, and affirmatively defended the suit on the grounds of usury and that under the provisions of the Federal Consumer Credit Cost Disclosure Act, that plaintiff violated the Act by failing to make the appropriate credit disclosures and failing to inform defendants of their right of rescission under the Act.

The case was vigorously prosecuted and tenaciously defended. The Court makes the following findings:

Plaintiff is indeed in the lending business; he is subject to the Truth and Lending Act; he did discount the $77,000.00 note, giving defendants only $70,000.00 and keeping $7,000.00 on the date of the execution of the legal instruments; that the interest charged by plaintiff was usurious; that the plaintiff is a creditor and defendants are consumers within the Truth and Lending Act; that the money was used by the defendants for personal, family, household and agricultural purposes; that plaintiff failed to provide defendants with duplicates of the instruments, as required.

It is the reasoning of the Court that defendants are entitled

to rescission under the provisions of 15 U.S.C., et seq. and that the defendants are not liable for that finance or any other charges in connection with this obligation, and the Court finds the notes and mortgage void by operation of law.

The federal law also specifies that the plaintiff must forfeit the entire amount of the funds advanced to the defendants in connection with the loan.

Plaintiff's failure to provide defendants with notice of the right of rescission entitles each of the defendants to recover $1,000.00 statutory penalty for plaintiff's failure to make the required disclosures.

Defendants are entitled to return of all interest paid being the sum of $8,983.28 under the Truth and Lending Law.

Accordingly, let there be judgment in favor of Donald E. Lester, Jr. and Suzanne Furger Lester, declaring the note mortgage and collateral note dated January 27, 1975 for $77, 000.00 be rescinded and declared null and void and cancelling the mortgage on the house and property listed in the mortgage. Let there further be judgment in favor of Donald E. Lester, Jr. and Suzanne Furger Lester and against R. C. Anderson for the return of the interest previously paid on the loan in the amount of $8,983.28 plus judgment in favor of Donald E. Lester, Jr. and Suzanne Furger Lester for $1,000.00, each, for civil penalties, as provided in the Truth and Lending Law.

Let there further be judgment in favor of defendants for attorney fees, as allowed by the Truth and Lending Law for the sum of $10,000.00; all at the cost of R. C. Anderson.

Opinion rendered at Natchitoches, Louisiana, on this, the 8 day of June, 1979.

/s/ W. Peyton Cunningham, Jr.
W. PEYTON CUNNINGHAM, JR., JUDGE

COPY TO:

Mr. Russell E. Gahagan
P.O. Box 70
Natchitoches, Louisiana 71457

Mr. Henry B. Bruser, III
P.O. Box 1431
Alexandria, Louisiana 71301

APPENDIX "D"

R. C. ANDERSON
VERSUS
DONALD E. LESTER, JR., ET AL

NUMBER 42,947
TENTH JUDICIAL DISTRICT COURT
NATCHITOCHES PARISH, LOUISIANA

EXCEPTION OF PRESCRIPTION OF ONE YEAR

Now into court comes R. C. Anderson, defendant, in reconvention in the above entitled and numbered cause, appearing through his undersigned counsel, for the purpose of filing this exception of prescription to the reconventional demand filed herein, and with respect shows:

1.

That the cause of action sued on in the reconventional demand filed herein is barred by the statute of limitation of one year, U.S. Code Annotated, Title 15, Section 1640(e).

WHEREFORE, exceptor prays that this exception of prescription of one year be sustained and the reconventional demand filed herein be dismissed with costs.

GAHAGAN & GAHAGAN

By_____
Russell E. Gahagan
P.O. Box 70
Natchitoches, LA 71457
Attorney for Exceptor

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing exception of prescription of one year was handed to opposing counsel prior to the filing of the original.

_____

Russell E. Gahagan

APPENDIX "E"

CIVIL SUIT NO. 42,974

R. C. ANDERSON
VERSUS
DONALD E. LESTER, JR., ET AL

TENTH JUDICIAL DISTRICT COURT
PARISH OF NATCHITOCHES
STATE OF LOUISIANA

ANSWER AND RECONVENTIONAL DEMAND

NOW INTO COURT, through their undersigned counsel, come Donald E. Lester, Jr. and Suzanne Furger Lester, defendants and for answer to the petition of plaintiff, R. C. Anderson, with respect show:

1.

Defendants admit the allegations of paragraph 1

2.

Defendants deny the allegations of paragraph 2, except as may be hereinafter explained, admitted, or modified.

Further answering, defendants show that they did, on January 27, 1975, execute a note in favor of R. C. Anderson in the sum of $77,000.00, with ten (10%) per cent per annum interest from date until paid, and providing for attorney's fees of ten (10%) per cent of the amount due in the event that the note was placed in the hands of an attorney for collection.

3.

Defendants deny the allegations of paragraph 3, except as may be hereinafter explained, admitted, or modified.

Further answering paragraph 3, defendants show that they did execute a collateral mortgage and act of mortgage as set forth in paragraph 3.

4.

For lack of sufficient information upon which to justify belief, defendants deny the allegations of paragraph 4.

5.

Defendants deny the allegations of paragraph 5, except as hereinafter explained, admitted, or modified.

Further answering, defendants show that the said obligations are the best evidence of their content.

6.

Defendants deny the allegations of paragraph 6.

7.

Defendants deny the allegations of paragraph 7.

8.

Defendants deny the allegations of paragraph 8. FURTHER ANSWERING PLAINTIFF'S PETITION, DEFENDANTS SHOW:

9.

In addition to providing for interest at the rate of ten (10%) per cent per annum from date, the aforedescribed demand note included capitalized interest in the amount of $7,000.00, which capitalized interest when added to the ten (10%) per cent per annum interest from date constitutes usurious contrary to the laws of the State of Louisiana.

10.

Petitioner is not entitled to recover any interest whatsoever on the aforedescribed note.

11.

Defendants are entitled to recover the $8,983.28 usurious interest paid by them on the said note.

12.

Defendants allege on information and belief that petitioner, R. C. Anderson, is engaged in the business of lending money to various persons, firms or corporations, and is under the laws of the United States of American, and particularly Title I of the Federal Consumer Credit Cost Disclosure Act and Regulation Z in connection with same, required to make certain disclosures to all parties with whom he might deal in the lending of money and that the petitioner, R. C. Anderson, failed to make such disclosures to defendants herein all in contravention to the laws of the United States of America, specifically Title I of the Federal Consumer Credit Cost Disclosure Act and regulations promulgated thereunder.

13.

As a result of petitioner's failure to make the disclosures

required by Title I of the Federal Consumer Credit Cost Disclosure Act and regulations thereunder, petitioner is liable to defendants in actual damages in the amount of $50,000.00.

14.

In addition, petitioner is liable to defendants for twice the amount of the financing charge in connection with the transaction, limited to a maximum of $1,000.00.

15.

Petitioner is also liable to defendants for the costs and attorneys' fees in connection with any litigation, including this cause, wherein he seeks to enforce the collection of the primary, or underlying, obligation herein. As of the date of filing this Answer, defendants compute this amount to be approximately $15,000.00.

FURTHER PLEADING IN THE ALTERNATIVE, DEFENDANTS AVER:

16.

The obligation outlined in paragraphs 2 and 3 of the petition was a financing transaction on defendants' home to which the right of rescission under Title I of the Federal Consumer Credit Cost Disclosure Act and Regulation Z apply

17.

The said transaction was not a purchase money mortgage.

18.

Defendants are entitled to rescind and hereby make demand for the rescission of the credit transaction herein because of

the petitioner's failure to make the disclosures required under Title I of the Federal Consumer Credit Cost Disclosure Act and regulations thereunder.

WHEREFORE, Defendants pray for judgment rejecting petitioner's demand at his cost.

DEFENDANTS FURTHER PRAY that after due proceeding there be judgment herein in favor of defendants, Donald E. Lester, Jr. and Suzanne Furger Lester and against petitioner, R. C. Anderson, cancelling all interest on the note herein and awarding defendants $8,983.28 for recovery of usurious interest paid by them on the said note, together with legal interest from date of judicial demand until paid.

DEFENDANTS FURTHER PRAY that there be judgmenr herein in favor of defendants and against petitioner for damages allowed by Title I of the Federal Consumer Credit Cost Disclosure Act and Regulations thereunder in the amount of $66,000.00, plus other such additional damages which defendants may sustain thereunder between the filing of this answer and the date of its final adjudication, together with legal interest from the date of judicial demand until paid.

DEFENDANTS FURTHER PRAY, in the alternative, that there be judgment herein under Title I of the Federal Consumer Credit Cost Disclosure Act and regulations thereunder in favor of defendants and against petitioner, R. C. Anderson, rescinding the credit transaction between the parties hereto and declaring it to be void.

DEFENDANTS FURTHER PRAY that there be judgment herein in favor of defendants and against petitioner for all costs of these proceedings.

Respectfully submitted,

GOLD, LITTLE, SIMON, WEEMS & BRUSER

By: _____

Ralph B. Chustz
620 Murray Street
Alexandria, Louisiana 71301

ATTORNEYS FOR DEFENDANTS

CERTIFICATE

I certify that a copy of the foregoing pleading has been served upon the petitioner, defendant in reconvention, herein by placing same in the United States mail, postage prepaid, addressed to his attorney, Marvin F. Gahagan, Gahagan & Gahagan, Attorneys at Law, P.O. Box 70, Natchitoches, Louisiana, 71457, on the _____ day of February, 1977.

_____

Of Counsel

APPENDIX "F"

CIVIL SUIT NO. 42,974

R. C. ANDERSON
VERSUS
DONALD E. LESTER, JR., ET AL

TENTH JUDICIAL DISTRICT COURT
PARISH OF NATCHITOCHES
STATE OF LOUISIANA

FIRST AMENDED ANSWER AND RECONVENTIONAL DEMAND

Now into Court come Donald E. Lester, Jr. and Suzanne Furger Lester, defendants, who respectfully represent that they desire to amend and supplement their original answer and reconventional demand in the following respects:

1.

By amending Paragraph 14 thereof to read as follows:

"In addition, petitioner is liable to each defendant for twice the amount of the financing charge in connection with this transaction, limited to a maximum of $1,000.00 per defendant."

2.

By deleting the language "Further pleading in the alternative, defendants aver:" appearing immediately prior to Paragraph 16, so as to make the allegations of Paragraph 16, et seq., primary, rather than alternative, allegations.

3.

By amending Paragraph 18 to read as follows:

"Pursuant to the Federal Consumer Credit Cost Disclosure Act and Regulation Z thereunder, defendants have elected to rescind the credit transaction herein and have provided petitioner with notice of this election."

4.

By adding Paragraph 19, as follows:

"19.

As the result of the exercise of their right of rescission, defendants are not liable for any finance or other charge in connection with the said transaction and any security interest given by them, including any such interest arising by operation of law, has become void."

WHEREFORE, defendants pray for leave of Court to file this supplemental and amending answer and reconventional demand; that their answer and reconventional demand herein be supplemented and amended in the particulars set forth above, and that after due proceedings had, there by a judgment rejecting petitioner's demands.

DEFENDANTS FURTHER PRAY that after due proceedings, there be a judgment herein in favor of defendants, Donald E. Lester, Jr. and Suzanne Furger Lester, and against petitioner, R. C. Anderson, cancelling all interest on the note herein and awarding defendants $8,983.28 for recovery of usurious interest paid by them on the said note, together with legal interest from date of judicial demand until paid.

DEFENDANTS FURTHER PRAY that there be a judgment

herein in favor of defendants and against petitioner for damages under Title I of the Federal Consumer Credit Cost Disclosure Act and Regulations thereunder in the amount of $67,000.00 plus other such additional damages which defendants may sustain thereunder between the filing of their original answer and the date of final adjudication, together with legal interest thereon from the date of judicial demand until paid.

DEFENDANTS FURTHER PRAY that there be a judgment herein under Title I of the Federal Consumer Credit Cost Disclosure Act and Regulations thereunder in favor of defendants and against the petitioner, rescinding the credit transaction between the parties heretok declaring it to be void, and ordering petitioner to return all money previously paid by defendants in connection wherewith, and to take all appropriate and necessary steps to cancel and terminate any and all security interest created under the transaction.

DEFENDANTS FURTHER PRAY that there be a judgment herein in favor of defendants and against petitioner for all costs of these proceedings.

Respectfully submitted,

GOLD, LITTLE, SIMON, WEEMS & BRUSER

By _____

Ralph B. Chustz
620 Murray Street
Alexandria, Louisiana 71301

ATTORNEYS FOR DEFENDANTS

ORDER

LET the foregoing supplemental and amending answer and reconventional demand be filed as prayed for.

Natchitoches, Louisiana, this _____ day of May, 1977.

_____

Judge

PLEASE SERVE by personal service only:

Marvin F. Gahagan, Attorney of record
for R. C. Anderson
133 St. Denis
P.O. Box 70
Natchitoches, Louisiana 71457

or

Any partner or office associate
in the law firm of Gahagan & Gahagan,
133 St. Denis
P.O. Box 70
Natchitoches, Louisiana 71457

APPENDIX "G"

66,552

Special Releases - Correspondence

[¶31,230] DISPOSITION OF PROCEEDS AFTER RESCISSION

This letter responds to your request of February 28, 1975, for an opinion as to the practical effect of the right of rescission under §226.9 [¶3585 - 3591] of Regulation Z.

Staff agrees with your underlying assumption that the right of rescission provided for in § 226.9 exists in both qualifying sale and nonsale credit transactions inasmuch as that section by its terms is applicable to "any credit transaction" in which a security interest is or will be acquired in any realty used or expected to be used as the principal residence of the customer.

You state that, in a 36-month instalment loan situation, a cognovit provision in the loan contract gives rise to a §226.9 right of rescission under Ohio law. You have inquired as to the effect of the creditor's failure to provide the rescission notice required by §226.9(b) [¶3588] where the customer has made payments for several months and then decides to exercise his right of rescission. Under §226.9(d) [¶3588], within ten days of receipt of a proper notice of rescission, the creditor must return any property which he has received from the customer.

Your first question is whether the customer is required to return the proceeds of the loan to the creditor where the creditor has terminated any security interest created by the transaction and returned to the customer the payments made to the creditor. Under §226.9(d) the customer must "tender the property [received from the creditor] to the creditor" upon payment by the creditor to the customer of any money

or property which he has received from the customer in connection with the transaction. It is the view of the staff that the proceeds of the loan should be considered property received by the customer from the creditor and that, in this situation, the customer must make tender of the proceeds to the creditor.

In your second question you ask whether the failure of the creditor to return the payments to the customer within ten days entitles the customer to retain the proceeds of the loan without further obligation to the creditor. Where the creditor has delivered property to the customer, § 226.9(d) provides that he may retain possession of it; only upon the creditor fulfilling his obligations under the subsection is the customer required to make tender of the property to the creditor. If the creditor fails within ten days to terminate any security interest and return the payments which he has received from the customer, he has by definition not fulfilled the requirements of the subsection, and staff is of the opinion that the customer need make no tender of the proceeds to the creditor, retaining them without further obligation.

Your third question is whether, in the situation described in question two, the customer can both maintain a cause of action against the creditor for not returning the payments to him ans retain the proceeds of the loan without further obligation to the creditor. While it is true that the customer may retain the proceeds in question two, §226.9(d) also provides, as explained in the response to question one, that the customer must make tender of the proceeds to the creditor where the creditor returns the payments. The customer may bring a civil action against the creditor for violation of Regulation Z, but it is the view of the staff that he must make tender of the loan proceeds to the creditor should the creditor return the payments within the stated period. Under the civil liability provisions, there might be a question as to whether a customer retaining the proceeds could be awarded the unreturned payments as damages.

For further guidance on this issue, we would direct your attention to *Eby v. Reb Realty*, CCH ¶98,839, April 1, 1974, in which the Ninth Circuit Court of Appeals addressed the issue of rescission and civil liability under Truth in Lending.

Excerpts from FRB Letter of May 29, 1975, by Jerauld C. Kluckman, Chief, Fair Credit Practices Section.

¶31,230
1975, Commerco Clearing House, Inc.

APPENDIX "H"

APPLICABLE STATUTES AND REGULATIONS

I. Applicable Statutes:

15 U.S.C. 1635:

"(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the thrid business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section, the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section."

"(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or

property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under this transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it."

"(f) An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs earlier, notwithstanding the fact that the disclosures required under this section or any other material disclosures required under this part have not been delivered to the obligor."

15 U.S.C. 1640:

"(a)Except as otherwise provided in this section any creditor who fails to comply with any requirement imposed under this part or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of–

(1) any actual damage sustained by such person as a result of failure;

(2) (a) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional."

"(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."

28 U.S.C. 2101:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

II. Regulations:

12 C.F.R. 226.9. Right to rescind certain transactions:

"(a) *General Rule.* Except as otherwise provided in this section, in the case of any credit transaction in which a security interest is or will be retained or acquired in any real property which is used or is expected to be used as the principal residence of the customer, the customer shall have the right to rescind that transaction until midnight of the thrid business day, following the date of consummation of that transaction or the date of delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor by mail, telegram, or other writing of his intention to do so. Notification by mail shall be considered given at the time mailed; notification by telegram shall be considered given at the time filed for transmission; and notification by other writing shall be considered given at the time delivered to the creditor's designated place of business.

(b) *Notice of opportunity to rescind.* Whenever a customer has the right to rescind a transaction under paragraph (a) of this section, the creditor shall give notice of that fact to the customer by furnishing the

customer with two copies of the notice set out below, one of which may be used by the customer to cancel the transaction. Such notice shall be printed in capital and lower case letters of not less than 12 point boldfaced type on one side of a separate statement which identifies the transaction to which it relates. Such statement shall also set forth the entire paragraph (d) of this section, "Effect of rescission." If such paragraph appears on the reverse side of the statement, the face of the statement shall state: "See reverse side for important information about your right of rescission." Before furnishing copies of the notice to the customer, the creditor shall complete both copies with the name of business, the date of consummation of transaction, and the date, not earlier than the third business day following the date of the transaction, by which the customer may give notice of cancellation. Where the real property on which the security interest may arise does not include a dwelling, the creditor may substitute the words "the property you are purchasing" for "your home," or "lot" for "home," where these words appear in the notice.

Notice to customer required by Federal law:

You have entered into a transaction on .... which may
(Date)
result in a lien, mortgage, or other security interest on your home. You have a legal right under Federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within 3 business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any

downpayment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying . . . . . at
(Name of Creditor)
(Address of creditor's place of business) by mail or telegram sent not later than midnight of . . . . . .
(date)
you may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction.

. . . .
(date) (customer's signature)

(c) *Delay of performance.* Except as provided in paragraph (e) of this section, the creditor in any transaction subject to this section, other than an extension of credit primarily for agricultural purposes, shall not perform, or cause or permit the performance of, any of the following actions until after the rescission period has expired and he has reasonably satisfied himself that the customer has not exercised his right of rescission:

(1) Disburse any money other than in escrow.

(2) Make any physical changes in the property of the customer;

(3) Perform any work or service for the customer; or

(4) Make any deliveries to the residence of the customer if the creditor has retained

or will acquire a security interest other than one arising by operation of law.

(d) *Effect of rescission.* When a customer exercises his right to rescind under paragraph (a) of this section, he is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within 10 days after receipt of a notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the customer. If the creditor does not take possession of the property within 10 days after the tender by the customer, ownership of the property vests in the customer without obligation on his part to pay for it."